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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

ROBERT T. BEVILL,
Petitioner,

v.

SPRINT COMMUNICATIONS CO., L.P.,
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals for the First Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

Robert T. Bevill
12 Blair Road
Merrimack, NH 03054
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Petitioner

June 5, 2006

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United States District Court,D. New Hampshire.
Robert T. BEVILL, Plaintiff
v.
SPRINT COMMUNICATIONS CO., L.P., Defendant
No. Civ. 04-CV-406-SM.

April 25, 2005.

Robert T. Bevill, pro se.

ORDER

MCAULIFFE, Chief J.

***1** Pro se plaintiff, Robert Bevill, brings this diversity action against Sprint Communications Company, L.P. ("Sprint"), seeking damages for alleged acts of fraud, negligent misrepresentation, and theft of proprietary information and trade secrets. Sprint moves to dismiss all claims in Bevill's complaint, asserting that he has named the incorrect defendant, Bevill lacks standing to assert those claims, and, in any event, even if the proper party were advancing those claims, they are barred by principles of res judicata and collateral estoppel. Bevill objects. For the reasons set forth below, Sprint's motion to dismiss is granted.

Standard of Review

When ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must "accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory." *Martin v. Applied Cellular Tech., Inc.*, 284 F.3d 1, 6 (1st Cir.2002). Dismissal is

appropriate only if "it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir.2000). *See also Gorski v. N.H. Dep't of Corr.*, 290 F.3d 466, 472 (1st Cir.2002) ("The issue presently before us, however, is not what the plaintiff is required ultimately to *prove* in order to prevail on her claim, but rather what she is required to *plead* in order to be permitted to develop her case for eventual adjudication on the merits.") (emphasis in original).

Notwithstanding this deferential standard of review, however, the court need not accept as true a plaintiff's "bald assertions" or conclusions of law. *See Resolution Trust Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir.1993) ("Factual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, but this tolerance does not extend to legal conclusions or to 'bald assertions.' ') (citations omitted). *See also Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.1987).

Here, in support of its motion to dismiss, Sprint relies on a number of documents that were filed in substantially similar litigation initiated by Bevill in the United States District Court for the District of Kansas (e.g., the complaint, various pleadings, the transcript of a judicial hearing, and a court order), as well as filings made in Bevill's personal bankruptcy proceeding. Typically, a court must decide a motion to dismiss exclusively upon the allegations set forth in the complaint (and any documents attached to that complaint) or convert the motion into one for summary judgment. *See* Fed.R.Civ.P. 12(b). There is, however, an exception to that general rule:

[C]ourts have made narrow exceptions for documents

the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.

*2 *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993) (citations omitted). *See also Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir.1998). Since Bevill does not dispute the authenticity of the documents on which Sprint relies, the court may properly consider those documents without converting Sprint's motion into one for summary judgment.

Background

Beginning in late 1998, Bevill began negotiating with Sprint (or one of its affiliates or subsidiaries) to supply certain services to assist Sprint (or, again, one of its affiliates or subsidiaries) in providing Internet access to military personnel on various military bases in the United States. Subsequently, on August 1, 2000, The Bevill Company, a Delaware corporation ("BC-Delaware"), entered into a "Master Services Agreement" with Sprint/United Management Company, a Kansas Corporation ("SUMC"). Bevill executed that contract on behalf of BC-Delaware, in his capacity as president and chief executive officer. *See* Exhibit 5 to defendant's memorandum.

The record suggests that, before the contract was executed, BC-Delaware had been dissolved by the Delaware Secretary of State. Accordingly, when Bevill signed the contract with SUMC, ostensibly on behalf of BC-Delaware, that corporation was no longer in existence. In an effort to explain that

situation, Bevill poses two somewhat conflicting scenarios. First, he claims to have executed the contract with the intent to assign all rights under it to a yet-to-be-created company by the same name, which he intended to incorporate (and subsequently did incorporate) in the State of New Hampshire-The Bevill Company, Inc. ("BC-New Hampshire"). The record is, however, devoid of any suggestion that Bevill and/or BC-Delaware ever assigned his/its rights under the contract to BC-New Hampshire.

Alternatively, Bevill suggests that the contract simply contained a typographical error and improperly recited the state of incorporation for the Bevill Company as Delaware, rather than New Hampshire. In other words, says Bevill, the contract identified a Delaware company that once existed, but had been dissolved, when it should have identified a yet-to-be created New Hampshire Company. The United States District Court for the District of Kansas appears to have adopted this interpretation of the relevant events. At the time of the Agreement's execution, [BC-Delaware's] incorporation was inoperative and, in effect, the company was nonexistent. Also at that time, Mr. Bevill was acting as the incorporator or promoter of the to-be-formed New Hampshire corporation. True to the intent, a few weeks later Mr. Bevill incorporated [BC-New Hampshire] under the laws of New Hampshire. [BC-New Hampshire] then undertook acts consistent with performance under the Agreement, including leasing equipment and installing circuitry on military bases. The court finds that [BC-New Hampshire] ratified and adopted the contract by undertaking a portion of the performance thereunder.

*3 *The Bevill Company, Inc. v. Sprint/United Mngt.*

Co., 2004 WL 2278582 (D.Kan. Sept. 2, 2004).

Between August 1, 2000 and November 2, 2001, Bevill claims that he (presumably as an employee or agent of BC-New Hampshire) provided SUMC with services valued at more than $500,000.00. On October 23, 2001, SUMC informed Bevill that it was terminating its contract with BC-Delaware (the corporate entity with which it believed it had contracted). When SUMC subsequently learned that BC-Delaware was not in existence at the time Bevill executed the contract on its behalf, SUMC notified Bevill of that additional basis for terminating the contract. *See* Exhibit 1 to defendant's memorandum.

Approximately one year later, on November 1, 2002, Bevill says he filed suit against SUMC in the United States District Court for the District of Kansas (the "Kansas case").[FN1] In that suit, BC-New Hampshire alleged that SUMC breached the parties' contract by improperly terminating it. In the alternative, BC-New Hampshire sought damages on a quantum meruit theory of recovery. The court concluded that SUMC had terminated the contract in compliance with its termination provisions, and held that BC-New Hampshire was not entitled to damages under a quantum meruit theory. Accordingly, it denied BC-New Hampshire's request for injunctive relief and granted SUMC's motion for summary judgment. That decision is now on appeal to the Court of Appeals for the Tenth Circuit.

FN1. That suit was actually brought by BC-New Hampshire, an entity of which Bevill says he is the "alter ego." The fact that Bevill says that he, rather than the corporation,

> "brought suit" in Kansas, illustrates one of the pervasive problems in this case: Bevill's apparent confusion between his own legal rights and obligations and those of the distinct corporate entities he has created.

Undeterred, Bevill filed this litigation, alleging that Sprint, while not a party to the contract between SUMC and the Bevill Company, was the real party in interest. Moreover, Bevill claims that two Sprint employees were active in the contract negotiations and negligently misrepresented material facts and fraudulently induced him (presumably on behalf of one of the two corporate entities known as the Bevill Company) to enter into the contract with SUMC. Bevill says he discovered the fraud on November 9, 2001 (approximately one week after he filed the Kansas case) and, therefore, asserts that his current claims have been brought within the pertinent limitations period.

Sprint, on the other hand, asserts that Bevill has named the wrong defendant in this suit, pointing out that it was never a party to the underlying contract. Moreover, Sprint asserts that any claims arising out of the contract (or its formation) belong to the corporate entity that actually entered into the contract, not Mr. Bevill himself. Finally, says Sprint, in light of the prior Kansas litigation, the claims Bevill seeks to advance in this case are barred by the doctrine of res judicata and principles of collateral estoppel.

Discussion

Despite Bevill's assertion that he is the "alter ego" of both the New Hampshire and Delaware corporations,

he lacks authority to pursue claims in his individual capacity that belong to those corporate entities. If, as Bevill claims, one of those corporations was fraudulently induced to enter into the contract with SUMC, then the corporation itself, and not Bevill, is the proper party to bring suit. As the Court of Appeals for the First Circuit has observed, "[T]he [alter ego] doctrine is thought to be equitable in nature. Consequently, it can be invoked only where equity requires the action *to assist a third party.*" Intergen N.V. v. Grina, 344 F.3d 134, 149 (1st Cir.2003) (citation and internal punctuation omitted) (emphasis supplied). *See also* Mass. Carpenters Cent. v. A.A. Bldg. Erectors, Inc., 343 F.3d 18, 21-22 (1st Cir.2003) (observing that the alter ego doctrine is "a tool to be employed when the corporate shield, if respected, would inequitably prevent a party from receiving what is otherwise due and owing *from the person or persons who have created the shield.*") (emphasis supplied).

*4 Here, by asserting that he is the "alter ego" of the New Hampshire and Delaware corporate entities, Bevill seems to suggest that he has disregarded the corporate form to such a degree that it would, under appropriate circumstances, be lawful to pierce the corporate veil(s) and impose upon him personal liability for what would traditionally be viewed as corporate obligations. That may or may not be accurate. But, this much can be said with confidence: Bevill cannot invoke the alter ego doctrine in an effort to personally assert claims or causes of action which, in reality, belong to the corporation(s). *See, e.g.,* McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir.1994) ("As appellant is not even arguably an innocent third party disadvantaged by someone else's blurring of the line between a corporation and the person who

controls it, but, rather, is himself the one who is claimed to have obscured the line, he cannot be permitted to use the alter ego designation to his own behoof.").

So it is in this case. As the party who admittedly blurred the line between the corporations and himself, Bevill cannot invoke the corporate alter ego doctrine in an effort to impose liability on Sprint (or its employees, corporate parents, or affiliates). In short, Bevill lacks standing to assert claims on behalf of either BC-Delaware or BC-New Hampshire. Accordingly, defendant's motion to dismiss must be granted.

Parenthetically, the court notes that even if Bevill were permitted to amend his complaint to add a party-plaintiff at this point, such an amendment would be futile. Presumably, the way to cure the defect in his complaint would be to add as plaintiffs one or both of the corporate entities over which he exercises control (to the extent they are still in existence). But, if he were to do so, the claims to be asserted by those entities (e.g., fraudulent inducement and negligent misrepresentation) would be barred by principles of collateral estoppel and res judicata, given the outcome of previous litigation in the United States District Court for the District of Kansas.

Conclusion

For the forgoing reasons, as well as those set forth in defendant's memorandum of law, defendant's motion to dismiss (document no. 11) is granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

D.N.H.,2005.
Bevill v. Sprint Communications Co., L.P.
Not Reported in F.Supp.2d, 2005 WL 943626 (D.N.H.), 2005 DNH 070

United States Court of Appeals,First Circuit.
Robert T. BEVILL, Plaintiff, Appellant,
v.
SPRINT COMMUNICATIONS COMPANY, L.P.,
Defendant, Appellee.
No. 05-1704.

Jan. 5, 2006.

Appeal from the United States District Court for the District of New Hampshire, Steven J. McAuliffe, U.S. District Judge.

Robert T. Bevill on brief pro se.
R. Matthew Cairns and Ransmeier & Spellman, P.C. and Mark D. Hinderks and Stinson Morrison Hecker LLP on brief for appellee.

Before BOUDIN, Chief Judge, STAHL, Senior Circuit Judge, and LYNCH, Circuit Judge.
*1 Prior report: 2005 WL 943626.

PER CURIAM.
After carefully considering the briefs and record on appeal, we *affirm* the judgment of the district court. Among other problems, the appellant has no standing to litigate claims that belong to a corporation. Moreover, he has no right to litigate claims in this circuit that are integral to a suit already filed elsewhere, and he makes no showing that the actions are distinct. *See, e.g., Montana v. United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)(describing the deleterious effects of repetitive suits); *Congress Credit Corp. v. AJC Intern., Inc.*, 42 F.3d 686, 689 (1st Cir.1994)(repetitive actions may be dismissed); *Gonzalez v. Banco Cent. Corp.*, 27

F.3d 751, 755-56 (1st Cir.1994).

Affirmed. 1st Cir. R. 27(c).

C.A.1 (N.H.),2006.
Bevill v. Sprint Communications Co., L.P.
163 Fed.Appx. 6, 2006 WL 20544 (C.A.1 (N.H.))

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October 31, 2005

By Fax and Ordinary Mail
Richard Cushing Donovan, Clerk
U.S. Court of Appeals, First Circuit
2500 John Joseph Moakley, U.S. Courthouse
One Courthouse Way
Boston, MA 02210

RE: **Robert T. Bevill v. Sprint Communications Company L.P., No. 05-1704**

Dear Mr. Donovan:

Pursuant to Federal Rule of Appellate Procedure 28(j), Defendant-Appellee Sprint Communications Company L.P. ("Sprint") hereby advises the Court of significant and pertinent authority of which it has become aware since the filing it of its Brief with the Court. Sprint encloses with this letter a copy of the U.S. Court of Appeals for the Tenth Circuit's Order and Judgment in The Bevill Company, Inc. v. Sprint/United Management Company, No. 04-3401 (10th Cir. October 25, 2005).

The Tenth Circuit's Order is pertinent to Sprint's arguments contained in Section III of its Brief to this Court (Sprint's brief at 18-25). Sprint argued in Section III that, even if Plaintiff-Appellant had standing to bring his case in the U.S. District Court

for the District of New Hampshire, his claims would be barred by the principles of collateral estoppel and res judicata in light of the disposition of a lawsuit in the U.S. District Court for the District of Kansas. Because the Tenth Circuit has reversed and remanded the judgment of the district court on which Sprint's argument relied, Sprint withdraws the argument in Section III of its Brief of Appellee.

Sprint further notes, however, that the Tenth Circuit's Order and Judgment in The Bevill Company, Inc. v. Sprint/United Management Company has no effect on Sprint's argument in Section II of its Brief to this Court. That argument is based on Plaintiff-Appellant's lack of (*2) standing, which was the basis of the judgment of the District Court that Plaintiff-Appellant is appealing to this Court.

I certify that a copy of this letter has been forwarded to Robert Bevill, *pro se*.

Very truly yours,

/s/ R. Matthew Cairns

Cc: Robert Bevill, *pro se*
Mark D. Hinderks, Esq.

United States Court of Appeals,First Circuit.
Robert T. BEVILL, Plaintiff, Appellant,
v.
SPRINT COMMUNICATIONS COMPANY, L.P.,
Defendant, Appellee.
No. 05-1704.

Mar. 9, 2006.

ORDER entered by Chief Judge Michael Boudin, Judge Juan R. Torruella, Judge Bruce M. Selya, Senior Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard.

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

United States Court of Appeals,Tenth Circuit.
The BEVILL COMPANY, INC., Plaintiff-Appellant,
v.
SPRINT/UNITED MANAGEMENT COMPANY,
Defendant-Appellee.
No. 04-3401.

Oct. 25, 2005.

Background: Internet services provider (ISP) brought action against telephone services provider (TSP), alleging breach of Master Services Agreement. The United States District Court for the District of Kansas granted summary judgment in favor of TSP. ISP appealed.

Holding: The Court of Appeals, Hartz, Circuit Judge, held that contract at issue was ambiguous as to intent of parties.

Reversed and remanded.

West Headnotes

Federal Civil Procedure 170A ⚿2492

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2492 k. Contract Cases in General.
Most Cited Cases
Master Services Agreement between Internet services provider (ISP) and telephone services provider (TSP) was ambiguous under Kansas law as to intent of parties, for purposes of TSP's motion to dismiss on

summary judgment ISP's claim for breach of contract; it was unclear as matter of law that parties intended to permit TSP to invoke Termination for Convenience provision without exerting effort required by Acceptance Procedures.

*49 David M. Skeens, Walters, Bender, Strohbehn & Vaughan, P.C., Kansas City, MO, for Plaintiff-Appellant.
Mark D. Hinderks, Stinson, Morrison & Hecker, Mark W. McGrory, Sprint Corporation, Overland Park, KS, for Defendant-Appellee.

Before EBEL, HARTZ, and McCONNELL, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

HARRIS L. HARTZ, Circuit Judge.
**1 After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff, The Bevill Co., Inc., appeals from a district

court order granting summary judgment to defendant Sprint/United Management Co. on the ground that under the terms of the agreement between the parties, Sprint could terminate its contract with Bevill at Sprint's convenience. We exercise jurisdiction under 28 U.S.C. § 1291. Because we determine the contract to be ambiguous, we reverse and remand for further proceedings.

*50 Bevill and Sprint entered into a Master Services Agreement (MSA) and a Contract Order as part of a single set of documents. The MSA provided that Bevill would provide internet services to certain military bases where Sprint was providing telephone services. Part E of the Contract Order is entitled "Acceptance Procedures." It provides that after a three-month trial period, the parties would meet to review program performance and, if necessary, would work together to form a written cure plan to bring the program into compliance. Sprint allegedly terminated the contract rather than work with Bevill to produce a cure plan.

The dispute between the parties focuses on the contractual terms relating to termination of their relationship. One such term appears in the "Acceptance Procedures" provision. The last sentence of the provision states: "If the parties are unable, after all due effort, to reach agreement on the cure plan or the future direction of the program, Sprint reserves the right to unilaterally terminate the program under section 4 of [the MSA]." Aplt.App., Vol. 1 at 98. Part F of the Contract Order, entitled "Term and Termination," immediately follows that sentence. It states: "The term of this Contract Order begins on August 1, 2000 and ends October 31, 2008. This Contract Order may be terminated in accordance

with the [MSA]." *Id.* The termination provisions of the MSA appear in Part 4.0, also entitled "Term and Termination." Section 4.1 sets forth the term of the MSA. Section 4.2, entitled "Termination for Convenience," permits Sprint to terminate the MSA, Contract Order, or both at any time without liability by providing notice. Unless the notice provides otherwise, termination is effective 10 days after the date of the notice. Section 4.3 permits either party to terminate for cause if one party believes the other has materially breached the MSA or Contract Order. Under the termination-for-cause provision, the party giving notice of the breach can terminate the contract if the breaching party does not cure within 30 days. Section 4.4 provides for termination if the control of Bevill changes, and § 4.5 provides for termination if the control of Sprint changes. Part I of the Contract Order and § 18.15 of the MSA both provide that if there is a conflict between the MSA and the Contract Order, the Contract Order controls.

**2 Sprint sent Bevill notice that it was terminating for convenience. Bevill then filed a complaint for breach of contract in the district court. Sprint moved for summary judgment on the ground that the contract provided for termination for convenience by Sprint at any time and without liability. Bevill responded that Sprint could not unilaterally terminate for convenience but had to comply with the Contract Order Acceptance Procedures. If Sprint could terminate for convenience, Bevill argued, the Acceptance Procedures were meaningless. Sprint countered that the Acceptance Procedures did not specifically override the termination-for-convenience provision and that termination for convenience should be considered an alternative means of proceeding with termination. According to Sprint, "This is

consistent with the coexistence of termination for convenience and termination for cause provisions in the contract." *Id.*, Vol. II at 146.

The district court granted Sprint's motion for summary judgment. It decided "as a matter of law that the [MSA] as written gives [Sprint] the absolute right to terminate the agreement 'without liability' and 'at any time,' subject only to the notice requirement which was fulfilled here." *Id.*, Vol. I at 37. Even though the court recognized that the Contract Order would prevail if there was a conflict with the MSA, the court ruled that the MSA termination*51 language did not conflict with the Acceptance Procedures in the Contract Order. The court viewed the Acceptance Procedures as an alternative because they did "not expressly p[ur]port to remove or revoke the termination for convenience provision," the termination-for-cause provision immediately followed the termination-for-convenience provision, and the termination-for-convenience language was clear. *Id.* at 37-39.

Thereafter, Bevill filed a motion to alter or amend the judgment. The district court denied the motion. This appeal followed.

"We review the district court's grant of summary judgment de novo, applying the same legal standard [to be] used by the district court." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.1999). The district court appropriately grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms*, 165 F.3d at 1326.

The parties agree that Kansas law applies. "In interpreting a contract, the primary role of the court is to ascertain and effectuate the parties' intentions where possible." *Time Warner Entm't Co., L.P. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1044 (10th Cir.2004) (applying Kansas law). "In Kansas, extrinsic evidence is not admissible if the intent of the parties in the contract is clearly ascertainable from the 'four corners' of the document." *City of Wichita v. Sw. Bell Tel. Co.*, 24 F.3d 1282, 1287 (10th Cir.1994). All contract provisions are construed together, "in harmony rather than in isolation." *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 974 P.2d 569, 574 (1999).

**3 Our disagreement with the district court is that we do not believe that the intent of the parties is "clearly ascertainable from the 'four corners' of the" MSA and Contract Order. *City of Wichita*, 24 F.3d at 1287. Both the MSA and Contract Order provide that the terms of the Contract Order prevail over those of the MSA if they conflict. The Acceptance Procedures state that "[i]f the parties are unable, after all due effort, to reach agreement on the cure plan or the future direction of the program, Sprint reserves the right to unilaterally terminate the program under section 4 of [the MSA]." Aplt.App., Vol. I at 98. The natural inference is that if Sprint has not exerted "all due effort" (and Bevill has) to reach an agreement with Bevill, then Sprint cannot unilaterally terminate under section 4. Otherwise, there would be no

purpose to the clause preceding the language "Sprint reserves the right to unilaterally terminate the program under section 4."

On the other hand, the second sentence of the provision immediately following the above-quoted sentence states: "This Contract Order may be terminated in accordance with the Agreement." *Id.* On its face this incorporates into the Contract Order the Termination for Convenience provision of the MSA. Again, however, such a reading would seem to render surplusage the language in the Acceptance Procedures that apparently sets a condition on unilateral termination by Sprint.

We cannot say with confidence that the parties clearly intended to permit Sprint to invoke the Termination for Convenience provision without exerting the effort required*52 by the Acceptance Procedures. The contract is ambiguous on this score. That ambiguity must be resolved by further proceedings below.

Bevill raises several other arguments on appeal. In light of our decision to reverse and remand, we need not reach those arguments. The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings.

C.A.10 (Kan.),2005.
Bevill Co., Inc. v. Sprint/United Management Co.
154 Fed.Appx. 49, 2005 WL 2746739 (C.A.10 (Kan.))

United States Court of Appeals,
Third Circuit.
MOFFATT ENTERPRISES, INC., Eugene Moffatt, Raymond Moffatt, Robert Moffatt and Sidney Moffatt, Appellants,
v.
BORDEN INC., a corporation
v.
Kathryn MOFFATT, Patricia A. Moffatt, and Renee M. Moffatt.
No. 86-3223.

Argued Sept. 30, 1986.
Decided Dec. 22, 1986.
Rehearing Denied Jan. 15, 1987.
As Amended Feb. 20, 1987.

Distributor and its shareholders brought suit alleging fraudulent inducement to enter distributorship agreements and misrepresentation. Action was initiated in state court and removed to federal district court, where manufacturer counterclaimed. The United States District Court for the Western District of Pennsylvania, Paul A. Simmons, J., granted summary judgment in favor of manufacturer, and plaintiffs appealed. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) there was fact question as to whether manufacturer was guilty of fraud or negligent misrepresentation, precluding summary judgment; (2) right of manufacturer to cease production did not bar shareholders' contention of contract voidable on proof of fraud in inducement; (3) complaint, besides averring damages to corporation, clearly pleaded causes of action running to shareholders individually; and (4) plaintiffs were entitled to amend their complaint to assert claim under Racketeer Influenced and Corrupt

Organizations Act.

Reversed and remanded.

James Hunter, III, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Federal Civil Procedure ⚿2515
170Ak2515 Most Cited Cases
There was fact question as to whether manufacturer of urea formaldehyde foam insulation was guilty of fraud or negligent misrepresentation, under Pennsylvania law, precluding summary judgment on claim of distributor's shareholders' that they were fraudulently induced to enter into distributorship agreements containing release of claims provision, and distributor's claim that such fraud and misrepresentation caused it to purchase unnecessary equipment.

[2] Contracts ⚿94(1)
95k94(1) Most Cited Cases
Right of manufacturer to cease production of urea formaldehyde foam insulation would not bar distributor's shareholders' contention, under Pennsylvania law, of contract voidable on proof of fraud in inducement.

[3] Corporations ⚿211(6)
101k211(6) Most Cited Cases
Complaint, besides averring damages to corporation, clearly pleaded causes of action under Pennsylvania law, running to shareholders individually, including loss both of funds in developing corporate plaintiff and another corporation, and of their positions with

previous employers.

[4] **Corporations** 🔑**202**
101k202 Most Cited Cases
Individual plaintiffs' status as shareholders in corporate plaintiff did not preclude their separate recovery.

[5] **Federal Civil Procedure** 🔑**841**
170Ak841 Most Cited Cases
Plaintiffs were entitled to amend their complaint to assert claim under Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. § § 1961-1968.

[6] **Federal Courts** 🔑**761**
170Bk761 Most Cited Cases

[6] **Federal Courts** 🔑**817**
170Bk817 Most Cited Cases
Review of district court's refusal to permit filing of amended complaint generally implicates abuse of discretion standard, but where district judge fails to state why he denied motion, Court of Appeals must determine whether there are any grounds to sustain his decision. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.
***1170** Daniel M. Berger, Ellen M. Viakley (argued), Berger, Kapetan, Malakoff & Meyers, P.C., Pittsburgh, Pa., for appellants.

Frederick N. Egler, Jr. (argued), Egler, Anstandig, Garrett & Riley, Pittsburgh, Pa., for appellee.

Before WEIS, MANSMANN, and HUNTER, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

The Moffatt brothers--Eugene, Raymond, Robert, and Sidney--and their corporation, Moffatt Enterprises, Inc., appeal from an order granting summary judgment in favor of the defendant, Borden, Inc. ("Borden").

The plaintiffs marketed a urea-formaldehyde foam insulation called Insulspray through a series of yearly distributor agreements with Borden. These agreements contained a release of claims and permitted the parties to terminate their venture upon six months' notice, or not to renew the distributorship at the end of the one-year terms. In their complaint, the plaintiffs allege, *inter alia,* that Borden fraudulently induced them individually to enter into the distributorship agreements when Borden knew of defects in Insulspray which would render the product unmarketable. Additionally, the corporate plaintiff averred that Borden's alleged misrepresentation about Insulspray caused it to purchase unnecessary and expensive equipment.

The district court concluded that any harm to the plaintiffs derived from the defendant's refusal to renew the distributor agreement--a permissible action under the contract's terms. The court then held that the alleged injuries were solely to the corporate plaintiff and that, therefore, the Moffatts as a matter of law lacked standing individually to sue. The court decided, moreover, that the release of claims provision protected Borden from liability, even assuming the truth of the plaintiffs' allegations of fraud and misrepresentation.

*1171 We find that the individual plaintiffs have produced evidence to establish claims grounded in fraudulent inducement to enter into the distributorship agreements. We further determine that the corporate plaintiff has presented evidentiary support for its claims of alleged fraud and misrepresentation which caused it to purchase some unnecessary equipment. Finally, we hold that on proof of fraud the plaintiffs may avoid the release provision of the distributorship agreements into which Borden allegedly fraudulently induced them to enter. Moreover, the Moffatts' status as shareholders in Moffatt Enterprises, Inc. does not in itself preclude their individual causes of action. Since the plaintiffs have presented evidence which a jury may find clear and convincing to support a claim of fraud and similarly preponderant evidence which can demonstrate their action for misrepresentation, material issues of fact remain for trial. We will, therefore, reverse the order of the district court which granted summary judgment in favor of Borden.

I.

A.

The district court assumed the following facts in ruling upon Borden's motion for summary judgment.

From 1975 to 1978 Borden manufactured and sold Insulspray, a patented urea-formaldehyde foam insulation product. Insulspray is composed of a urea-formaldehyde resin and a surfactant, which a foaming gun mixes and propels into a wall cavity where the mixture hardens.

In March of 1975, Eugene Moffatt contacted Borden to obtain urea-formaldehyde foam insulation, then a new product to the American marketplace, for his

home. Eugene learned from Roy Wendt, a Borden salesman, that Borden did not have a distributor for its insulation product, Insulspray, in Eugene's area. Several meetings and telephone conversations were subsequently held regarding the possibility of Eugene becoming an Insulspray dealer. In May, Eugene and Raymond Moffatt met with Wendt and other Borden employees at its laboratory in Bainbridge, New York. There Borden personnel demonstrated Insulspray to Eugene and Raymond and assured them that it was non-toxic and resisted significant shrinkage.

In the fall of 1975, Eugene, Raymond, and Robert Moffatt formed a partnership, Moffatt Enterprises, to distribute Insulspray to authorized dealers in New Castle, Pennsylvania. The partnership, in turn, established Thermal Acoustics, a business which installed Insulspray.

On October 31, 1975, the Moffatts entered into the first in a series of distributor contracts with Borden. The agreement provided in relevant part:

> 11. Product and Distribution Policy Changes--The Manufacturer [Borden] reserves the right from time to time, in its absolute discretion, without thereby incurring any liability to the Distributor with respect to any purchase order theretofore placed by the Distributor, or otherwise, to discontinue or to limit its production of any product, to terminate or limit deliveries of any product the production of which is so discontinued or limited, to alter the design or construction of any product, to add new and additional products to its lines, to substitute such altered products for the prior products in filling orders, and to change its sales and distribution policies.

* * *

16. No Liability for Termination or Nonrenewal--Neither the Manufacturer nor the Distributor shall, by reason of the termination or nonrenewal of the Distributor's distributorship of said product, be liable to the other for compensation, reimbursement or damages on account of expenditures, investments, leases or commitments in connection with the business or good will of the Manufacturer or the Distributor, or otherwise.

* * *

18. Release of Claims--In consideration of the execution of this agreement by the Manufacturer, and of such sales of said *1172 products as the Manufacturer may make to the Distributor within the term hereof, the Distributor hereby releases the Manufacturer from all claims, demands, contracts, and liabilities, if any there be, as of the date of the execution of this agreement by the Distributor.

As business grew, Sidney Moffatt quit his job at the Lockley Manufacturing Company to work full-time for Moffatt Enterprises in 1976. Eugene, Raymond, and Robert, however, maintained their positions at the Packard Electric Company. Throughout 1976 the plaintiffs received written materials from Borden attesting to the safety and effectiveness of Insulspray.

In January of 1977, Borden created a separate department of its Adhesives and Chemicals Division under General Manager David Sullivan to sell Insulspray. Borden inaugurated a major marketing program one month later with a meeting for Insulspray distributors, including Eugene and Raymond Moffatt, at Amelia Island, Florida. There, Robert Gutheil, then a vice-president in Borden's

Adhesives and Chemicals Division, allegedly labeled Insulspray "as safe as the air one breathes and the water one drinks." Borden officials also reported that Borden had thoroughly tested Insulspray and had received no customer complaints.

However, the Consumer Product Safety Commission previously had received several reports of formaldehyde fumes and illness in homes insulated with Insulspray. [FN1] Borden also was facing two lawsuits over Insulspray. Internal Borden memoranda, moreover, had acknowledged the off-gassing problem in 1975.

> FN1. The plaintiffs averred in their complaint that the Insulspray process releases formaldehyde, a toxic substance. Specifically, the record evinces that formaldehyde irritates the eyes, lungs, and skin, and in severe cases may even cause death. More importantly, the plaintiffs claimed that Borden recognized Insulspray's hazards before they began marketing it. Borden, in addition, allegedly had concealed that Insulspray would shrink as it dried and, thereby, would lose some twenty-seven percent of its R-value.

At the Amelia Island distributors' meeting in 1977, Sullivan and Gutheil told Eugene and Raymond Moffatt that they would henceforth have to work full-time as Insulspray distributors. Sullivan and Gutheil reassured the Moffatts of Insulspray's safety and effectiveness. The Moffatts thereafter resigned from the Packard Electric Company to form Moffatt Enterprises, Inc. [FN2] Also at Borden's behest, they later established Insulattic, Inc. to fabricate cellulosic

insulation for attics. Borden officials orally assured the plaintiffs that it would renew their distributor agreement every year.

> FN2. According to the complaint, Borden fraudulently induced the Moffatts to found Moffatt Enterprises, Inc. and, thereby, caused them to lose sums invested in the business and to leave their former jobs.

In 1977, the plaintiffs purchased $578,000 worth of material from Borden-- over $500,000 more than in 1976. At the same time, the defendant continued to receive health-related complaints about Insulspray without informing the plaintiffs. Borden also witnessed a dramatic downturn in Insulspray's profitability throughout 1977. The defendant concealed its losses from its distributors, however, at sales meetings in the fall of 1977 and in early 1978. Toward the 1978 year's end, the plaintiffs' sales of Insulspray, like those in the industry at large, had significantly declined.

In the fall of 1978, Borden had privately decided to withdraw Insulspray from the market. Nonetheless, Borden representatives urged the plaintiffs at a meeting in Columbus, Ohio to enlarge their distribution area into North Carolina. The plaintiffs aver that in direct reliance on these representations, the corporate plaintiff, in October, 1978, bought bulk equipment to prepare for an expanded territory.

Eugene Moffatt met with Borden salesman Roy Wendt one month later to explore rumors concerning Borden's withdrawal from the foam insulation market. Wendt denied the reports and encouraged the plaintiffs to attend an upcoming trade show in North

Carolina. Two weeks after *1173 they returned home from the trade show, Borden notified the plaintiffs on December 4, 1978 that it would stop producing Insulspray on December 31, 1978.

On that date, the plaintiffs' distributor agreement with Borden expired by its terms. It contained the same contractual provisions reserving to Borden the absolute right to discontinue Insulspray production, and immunizing the parties from liability for not renewing the distributorship, as in the original agreement. Despite the individual plaintiffs' attempts to sustain Moffatt Enterprises, Inc., it ceased to function in 1980.

B.

On October 18, 1982, the individual and corporate plaintiffs sued the defendant in a Pennsylvania state court. The complaint contained eleven counts based upon fraud, misrepresentation, breach of fiduciary duty, strict liability, breach of warranties, and wrongful termination. Borden subsequently removed the case to federal court where the defendant then answered the complaint and filed a four-count counterclaim. On the plaintiffs' motion, the district court granted partial summary judgment on two counts of the counterclaim [FN3]; two remain unadjudicated. [FN4]

> FN3. The court held that an indemnification provision in the distributor agreement did not require the corporate plaintiff to indemnify Borden for products liability and negligence claims, and that Borden could not hold the individual plaintiffs liable as guarantors for debts owing to it.

> FN4. The district court decided that the corporate plaintiff breached the distributor agreement by failing to purchase liability insurance; the court, therefore, denied the plaintiffs' motion on that count. The plaintiffs excluded from their summary judgment motion Borden's counterclaim to recover the price of goods for which the corporate plaintiff had not paid.

Borden then filed a motion for summary judgment on the plaintiffs' complaint, which the district court granted in full, disposing of the plaintiffs' case entirely. The court denied the plaintiffs' motions for reconsideration and to amend their pleading. The district court directed the entry of final judgment on the plaintiffs' claims pursuant to Fed.R.Civ.P. 54(b), and certified them for appellate review according to 28 U.S.C. § 1292(b). The plaintiffs timely filed a notice of appeal.

II.

The plaintiffs advance four issues on appeal. We recast them, however, to reflect more properly the district court's grounds for decision.

First, the plaintiffs contend that the district court erred in holding that, even assuming their allegations of fraud and misrepresentation, the distributor agreement protected the defendant from liability. Second, the plaintiffs attack the district court's finding that their damages stemmed not from Borden's alleged misrepresentations but from its refusal to continue the production of Insulspray. Third, the Moffatts fault the court's ruling that they lacked standing as individuals to sue Borden since their injuries derived from alleged harm to the corporate

plaintiff. Finally, the plaintiffs claim that the district court abused its discretion in denying their motion for leave to amend their complaint to add claims based upon the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. § § 1961-1968 (1982 & Supp. III 1985).

On review of the district court's grant of summary judgment, we likewise examine whether "no genuine issue as to a material fact remains for trial, and [whether] the moving party is entitled to judgment as a matter of law." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). In applying the law to undisputed facts, our review is plenary. *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir.1985). We may reverse the district judge's refusal to permit the plaintiffs to amend their complaint if the judge abused his discretion with respect to the liberal standard of Fed.R.Civ.P. 15(a) *1174*Adams v. Gould, Inc.*, 739 F.2d 858, 863 (3d Cir.1984), *cert. denied*, 469 U.S. 1122, 105 S.Ct. 806, 83 L.Ed.2d 799 (1985).

III.

A.

[1] We agree, in light of the plaintiffs' allegations of fraud and misrepresentation, that the district court erred in holding that the distributor agreement insulated the defendant from any liability for the plaintiffs' losses.

The district court's analysis might properly apply to a cause of action arising out of the parties' contractual relationship. Yet the plaintiffs have averred fraud in the inducement. Thus, the exculpatory clauses upon which the court and the defendant rely, *see supra*

pages 1171-1172, simply fail to respond to the plaintiffs' claims.

Under Pennsylvania law, a defrauded party may pursue several remedies including an action of damages for deceit, recission and restitution based on fraud, and reformation of the contract for fraud. *See* *Scaife v. Rockwell-Standard Corp.*, 446 Pa. 280, 289, 285 A.2d 451, 456 (1971), *cert. denied,* 407 U.S. 920, 92 S.Ct. 2459, 32 L.Ed.2d 806 (1972); *Germantown Manufacturing Co. v. Rawlinson,* 341 Pa.Super. 42, 48-50, 491 A.2d 138, 141-142 (1985). *See generally* 12 S. Williston, A Treatise on the Law of Contracts § § 1523-1525A (3d ed. 1970 & Supp.1986) (discussing remedies available to defrauded parties); E.A. Farnsworth, Contracts, § 4.15 (1982) (discussing the effects of and remedies for misrepresentation).

The Pennsylvania Supreme Court in *Scaife Co.* set forth the elements of fraudulent misrepresentation:

> (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result.

Scaife Co., 446 Pa. at 285, 285 A.2d at 454, *quoting* *Neuman v. Corn Exchange National Bank and Trust Co.*, 356 Pa. 442, 450, 51 A.2d 759, 763 (1947). *See* *Germantown Manufacturing Co.*, 341 Pa.Super. at 47-48, 491 A.2d at 141-142; *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa.Super. 90, 107-109, 464 A.2d 1243, 1251-1252 (1983); *Blose v. Martens,* 173 Pa.Super. 122, 95 A.2d 340 (1953); Farnsworth, *supra,* § 4.10. Pennsylvania has adopted Restatement (Second) of Torts § 552 regarding the

elements of negligent misrepresentation. Section 552 provides in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id., quoted in Mill-Mar, Inc. v. Statham, 278 Pa.Super. 296, 299, 420 A.2d 548, 550 (1980).

The authorities make clear that a party may avoid a release of claims which another procures through fraudulent assertions of past or existing fact. Germantown Manufacturing Co., 341 Pa.Super. at 47-48, 491 A.2d at 141-142; *Blose*, 173 Pa.Super. at 123, 95 A.2d at 340. *See* Neale v. American Motorists Fire Insurance Co., 185 Pa.Super. 60, 62, 138 A.2d 290, 291 (1958); *see also* Mannke v. Benjamin Moore & Co., 375 F.2d 281, 285 (3d Cir.1967) (citing with approval a jury charge that a release may be set aside in the presence of fraud). Moreover, a party who suffers another's negligent misrepresentation may recover damages thereby occasioned. Mill-Mar, Inc., 278 Pa.Super. at 299, 420 A.2d at 550.

In responding to the defendant's motion for summary judgment, the plaintiffs met their burden of coming forward with evidence which could lead a jury to find clear and convincing proof of fraud and preponderant proof of negligent misrepresentation. ***1175** *See, e.g.,* Roman Ceramics Corp. v. Peoples National Bank, 714 F.2d 1207, 1215 (3d Cir.1983) (requiring

clear and convincing evidence to establish fraud); *Rippee v. Grand Valley Manufacturing Co.*, 762 F.2d 25, 27 (3d Cir.1985) (noting that a preponderance of the evidence is needed to prove negligence). For example, Borden had acknowledged an off-gassing problem with urea-formaldehyde resins generally as early as 1970 when Myron W. Kelly, a former chemist with Borden, published a symposium paper concerning formaldehyde release from particleboard. The plaintiffs introduced the deposition of John Hine, the Western Director of Research and Development for Borden's Adhesives and Chemicals Division, who identified Kelly's paper and further admitted attending a 1971 international colloquium addressing formaldehyde off-gassing. Hine also stated that Borden had received complaints regarding formaldehyde-related health problems from homeowners who purchased Insulspray in 1974 and 1975. Hine reported that formal notice of such complaints eventually reached the Consumer Product Safety Commission.

Such factors apparently occasioned a 1975 internal memorandum by Robert Gutheil, then Adhesives and Chemicals Division Vice-President, calling for a resolution of any potential hazard of formaldehyde release from Insulspray. Gutheil's memorandum, as well, requested Borden's technical personnel to re-examine "whether the [off-gassing] is an application or a product problem." Moreover, the deposition of Borden's Dr. Alfred Cummin [FN5] suggests that a report by The National Institute of Occupational Safety and Health discussing the harmful effects of formaldehyde came to Borden's attention shortly after its publication in 1976. Borden, in fact, later faced two lawsuits over Insulspray. Nonetheless, Borden concealed all of this information from the Moffatts.

FN5. The present status of Cummin in the Borden organization is unclear in the record. His deposition indicates, however, that until at least 1974 Cummin worked at the management level in Borden's Adhesives and Chemicals Division. Thereafter, he became Technical Director in the corporate offices.

Additionally, Eugene Moffatt testified at his deposition that Borden officials orally and by written materials assured the plaintiffs that Borden had fully tested Insulspray and repeatedly claimed that it was non-toxic and resisted significant shrinkage. In fact, though, it appears from the depositions of Dr. Cummin, Dr. James Williams (the manager of Borden's Louisville Laboratory for Adhesives and Chemicals), and Adhesives and Chemicals Division Manager David Sullivan that Borden conducted only a flammability study of the product. Moreover, Borden supplied the Moffatts with technical data indicating a 1.6% figure of linear shrinkage for Insulspray. Yet, contrary to Borden's other alleged representations, it appears from Dr. Sullivan's deposition that Borden may have lacked the data necessary to assess in-place performance accurately. The plaintiffs accordingly presented evidence that Insulspray's thermal efficiency fell substantially below Borden's estimates.

Finally, Borden's former Executive President Robert Gutheil stated in his deposition that Borden had decided to withdraw Insulspray from the market sometime in the fall of 1978. According to Eugene Moffatt's deposition, however, Borden representatives were simultaneously encouraging the Moffatts to expand their territory into North Carolina. This fact

allegedly caused the corporate plaintiff to purchase expensive bulk equipment. A few weeks later the Moffatts received a letter notifying them that Borden would immediately cease Insulspray production.

In sum, we certainly could not, as a matter of law, effectively direct a verdict for Borden on the facts of record. Thus, the district court here erred in holding that the releases in the distributor agreement excused Borden's alleged fraud and misrepresentation and precluded its liability for damages.

***1176** B.

The plaintiffs also attack the district court's finding that Borden's refusal to continue producing Insulspray, and not the alleged misrepresentations, caused the plaintiffs' damages.

Specifically the district court found:

> The allegations of fraud and negligent misrepresentation, even if true are insufficient to overcome the contractual provisions, since the misrepresentations did not alter the fact that Defendant Borden had the legal right to cease production of Insulspray, and the alleged misrepresentations could not have been the cause of Plaintiffs injuries stemming from the nonrenewal of the distributorship agreement.

Moffatt Enterprises, Inc. v. Borden, Inc., No. 82-2536, slip op. at 26 (W.D.Pa. June 20, 1985). Again, however, Pennsylvania law permits a cause of action based upon fraud in the inducement to execute the contract, which is precisely the cause of action here.

The defendant might justify its nonrenewal of the distributor agreement absent the plaintiffs' claims of

misrepresentation. Yet the plaintiffs aver that they never would have entered into the contract with Borden had it previously disclosed the alleged defects in Insulspray. As we have explained, the plaintiffs have presented evidence sufficient to support a finding that they justifiably relied to their detriment upon Borden's alleged misrepresentations. This evidence gives rise to material questions of disputed fact not suited for summary judgment.

[2] It may be that the defendant had the right, perhaps even a duty, to discontinue production of Insulspray, independent of any contractual provision. That factor may be relevant on the issue of damages but would not bar the plaintiffs' contention of a contract voidable on proof of fraud in the inducement. *Cf. Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 408 (3d Cir.1981) (evidence of fraud in the inducement is outside of the parole evidence rule and will render a contract void or voidable at the option of the injured party).

C.

[3] We also find error in the district court's ruling that the Moffatts lacked standing to sue Borden since their alleged injuries arose from harm to Moffatt Enterprises, Inc. To the contrary, the plaintiffs' complaint, besides averring damages to Moffatt Enterprises, Inc., clearly pleads causes of action running to the Moffatts individually.

[4] Initially, the district court erred in ruling that the Moffatts' status as shareholders in the corporate plaintiff precluded their separate recovery. In *Davis v. United States Gypsum Co.*, 451 F.2d 659 (3d Cir.1971), the plaintiff alleged, *inter alia*, that the defendants had conspired to defraud Cardinal

American, Inc., in which the plaintiff held stock, of its most valuable asset, a distributor agreement granted to it by United States Gypsum Co. Davis averred that Cardinal American's consequent bankruptcy caused him to sustain losses as a guarantor of Cardinal American notes. The district court relied upon a release from the bankruptcy trustee to United States Gypsum to bar Davis's causes of action. We reversed.

We explained:

> It is hornbook law that claims asserted for the benefit of stockholders *qua* stockholders in a corporation because of the tortious acts of its officers or those actions in conjunction with them is a class suit, a derivative action, and recovery is for the benefit of the corporation directly and indirectly to its stockholders. It is equally clear that where a corporation, tortiously conspires with others to damage an individual and does so a cause of action arises which belongs to the individual. [Footnotes omitted.] Recovery can then be had by the individual against the corporation.

Id. at 662. *Accord* ***K-B Trucking Co. v. Riss International Corp.*, 763 F.2d 1148 (10th Cir.1985)** (holding that the sole shareholder of the plaintiff corporation also *1177 qualified as a real party in interest where the defendant allegedly fraudulently induced him to enter various agreements and to form the corporate plaintiff).

Here, the complaint avers that the individual plaintiffs sustained actual and consequential damages including the loss both of funds in developing the corporate plaintiff and Insulattic, Inc., and of their positions at Lockley Manufacturing and Packard Electric. The Moffatts' premise their claims upon,

inter alia, fraud, misrepresentation, and breach of fiduciary duty. We express no opinion on the merits of any claim. Yet, quite apart from Borden's alleged wrongdoings toward Moffatt Enterprises, Inc., the Moffatt brothers manifestly suffered harm in their individual capacities. We hold, therefore, that the Moffatts may pursue their individual causes of action following remand to the district court.

D.

[5] Finally, we hold that the district court should permit the plaintiffs to amend their complaint following our remand.

After the district court granted summary judgment in favor of Borden, the plaintiffs moved to amend their complaint to assert a RICO claim. The plaintiffs then filed a second amendment, apparently when the court requested separate *ad damnum* clauses for the individual and corporate plaintiffs. The new complaint retained the causes for fraud, misrepresentation, breach of fiduciary duty, and RICO, but dropped the claims for breach of warranty, strict liability, and wrongful termination of the distributor agreement. The district judge, however, summarily denied the plaintiffs' motions.

[6] Review of a district court's refusal to permit the filing of an amended complaint generally implicates an abuse of discretion standard. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Heyl & Patterson International, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.,* 663 F.2d 419, 425 (3d Cir.1981), *cert. denied,* 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982). Where, as here, the district judge fails to state why he denied the motion to amend, we must determine whether any

grounds exist to sustain his decision. *Adams*, 739 F.2d at 863.

The defendant proffers several theories in favor of the district court's actions. But the defendant's arguments presume that the court properly granted summary judgment against the plaintiffs on the merits. In light of our foregoing discussion, then, we find the grant of summary judgment insufficient to support the court's decision. No other reason has been proffered to permit disallowance of an amended complaint.

IV.

We conclude that the district court erred in holding that the releases in the distributor agreements protected Borden from liability for the fraudulent misrepresentations that allegedly induced the individual plaintiffs in the first instance to enter into those contracts. Moreover, because Borden allegedly fraudulently induced the Moffatts to execute the releases on behalf of the corporate plaintiff, it may, like the individual plaintiffs, recover provable losses caused by Borden's alleged misrepresentations. We also hold that the Moffatts' status as shareholders in the corporate plaintiff cannot preclude their individual causes of action. We, therefore, will reverse the judgment of the district court and reinstate the complaint in its entirety. On remand the district court should permit the plaintiffs leave to amend their complaint.

JAMES HUNTER, III, Circuit Judge, dissenting:

I agree with the majority's conclusions that (a) the releases in the distributorship agreement do not shield Borden from liability for fraud or negligent

misrepresentation, and (b) the defendants' allegedly fraudulent representations, not Borden's termination of the distributorship agreement, were the proximate cause of the plaintiffs' alleged injury. Nevertheless, I would affirm the district court's grant of summary judgment to the appellee. We are free to affirm a grant of *1178 summary judgment by the court below on alternative grounds as long as those grounds are supported by the existing record. *See* Johnson v. Orr, 776 F.2d 75, 83 (3d Cir.1985), *aff'd*, 780 F.2d 386 (3d Cir.), *cert. denied*, --- U.S. ----, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986). I would affirm the district court's grant of summary judgment to the appellee because I believe that the appellants have not demonstrated an ability to prevail on their substantive fraud or negligent misrepresentation claims.

I agree with the majority that summary judgment should be granted only where "no genuine issue as to a material fact remains for trial, and the moving party is entitled to judgment as a matter of law." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). Of course, no genuine issue of material fact remains for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242 - ----, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Therefore, when ruling on a summary judgment motion, a judge is instructed by Supreme Court precedent to "view the evidence presented through the prism of the substantive evidentiary burden," *id.*, 106 S.Ct. at 2513, that the parties must bear at trial. Under Pennsylvania law, a plaintiff must present clear and convincing evidence of fraud in order to vitiate the provisions of a written contract. *See* Seidman v.

American Express Co., 523 F.Supp. 1107, 1111 (E.D.Pa.1981). To prevail on a negligent misrepresentation claim, the plaintiff must prove negligence by a preponderance of the evidence. *See Sowizral v. Hughes*, 333 F.2d 829, 833 (3d Cir.1964).

After nearly two years of discovery--the fruits of which fill a seven-volume appendix running over 1200 pages--the plaintiffs in this case have failed to make a showing sufficient to establish--either clearly and convincingly or by a preponderance of the evidence--the existence of the elements necessary to their success on either their fraud or their negligent misrepresentation claims. The Supreme Court has instructed us to enter summary judgment in a case like this, where, "after adequate time for discovery, ... a party ... fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Thus, the motion for summary judgment must be granted for appellee, because appellants are unable to present clear and convincing evidence to support their claim of fraud, or a preponderance of the evidence to support their claim of negligent misrepresentation. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

To make out a claim of fraud under Pennsylvania law, the plaintiff must show: " '(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result.' "

Delahanty v. First Pennsylvania Bank, 318 Pa.Super. 90, 108, 464 A.2d 1243, 1252 (1983). To make out a claim of negligent misrepresentation, the plaintiff must show:

> (1) One who, in the course of his business ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Mill-Mar, Inc. v. Statham, 278 Pa.Super. 296, 299, 420 A.2d 548, 550 (1980), *appeal dismissed*, 499 Pa. 219, 452 A.2d 1017 (1982). Moffatt alleges that Borden misrepresented Insulspray in four factual areas: safety and toxicity, shrinkage, testing, and the future profitability of Insulspray. I find no support for appellants' claims that Borden misrepresented Insulspray in these areas, either intentionally or negligently. I *1179 will consider each of appellants' contentions in turn.

Moffatt alleges that Borden knew Insulspray to be unsafe and toxic. To show that Borden knew of the toxicity problems of Insulspray as far back as 1976, Moffatt points to a December 1976 report by the National Institute of Occupational Safety and Health, which was in Borden's possession, on the possible harmful effects of formaldehyde. This document is totally inconclusive on the subject of the toxicity of urea-formaldehyde foam insulation "UFFI", and thus cannot support Moffatt's claim of misrepresentation. Moffatt also points to Borden's receipt of consumer complaints as evidence that Borden knew that Insulspray had adverse health effects on consumers. Borden responds that any adverse health effects that did in fact occur were attributable not to any danger

inherent in the product, but to applicator error, which Borden endeavored to correct. Furthermore, the health complaints Borden received were minuscule: in the four years that Borden was in the UFFI business, 46,027 installations of Insulspray were made, and 16 health complaints were received. Nevertheless, Moffatt complains that Borden misrepresented the degree of consumer dissatisfaction by not openly discussing specific consumer complaints--notably, two lawsuits that had been filed against Borden--at the Amelia Island meeting. Borden responds that it did not think such disclosure was necessary, and points out that the topic of handling consumer complaints in general was discussed at length at the conference. Borden cannot be accused of any material nondisclosure of consumer complaints about Insulspray.

Secondly, Moffatt alleges that Borden misrepresented the degree of shrinkage undergone by UFFI after installation. Borden stated in its 1976 marketing literature that the shrinkage rate of UFFI was between 1.6 and 3.8%. Moffatt complains that this was only a linear measure, which did not describe volumetric shrinkage. Borden openly stated that the measure was only linear and made no representation as to volumetric shrinkage, so there is no misrepresentation. Similarly, Moffatt complains that Borden's literature made no mention of the effect of shrinkage on UFFI's R-value (a measure of thermal efficiency), and that the recited R-value was based on a standard that did not take into account in-place performance. Moffatt observes that at the time the R-value representations were made, Borden did not have the data needed to make an accurate assessment of the effect of shrinkage and in-place performance on the measure of Insulspray's thermal efficiency.

Moffatt's allegations here show only that the R-value reported by Borden was an inadequate predictor of thermal efficiency; they do not demonstrate any misrepresentation on Borden's part.

Thirdly, Moffatt claims that Borden misrepresented to its distributors that Insulspray had been fully and extensively tested. In fact, the only test performed on Insulspray before Borden withdrew from the market was a flammability study performed in 1976; no toxicology studies were done prior to 1979. Moffatt fails to allege, much less advance proof of, a single misrepresentation by Borden on the topic of testing. In his deposition, Eugene Moffatt testified at length about his repeated--and apparently unavailing--requests that Borden perform various tests. Appendix at 875-83. The Moffatts may believe that Borden was negligent in failing to have Insulspray exhaustively tested prior to putting it on the market, but they have failed to provide any support for their claims of fraud and negligent misrepresentation now under review.

Finally, Moffatt complains that Borden misrepresented Insulspray's profitability and the company's intention to commit itself to long-term production of the product. Moffatt points to Borden's statements at the Amelia Island conference that Borden "was committed to make Insulspray its number one product," that the distributors "would be millionaires in five years," and similar statements to show that Borden misrepresented to the distributors that the company was financially viable. This claim does not merit extensive consideration because such statements constitute nonactionable "pep" talks upon which no reasonable ***1180** person can rely or consider an objective statement of fact. *See General*

Electric Co. v. N.K. Ovalle, Inc., 335 Pa. 439, 6 A.2d 835 (1939). Plaintiffs were experienced and mature businessmen. They are not defenseless consumers in need of judicial protection from powerful and wily business interests. Plaintiffs chose to enter the business world and play in the major leagues. There is no warrant for the courts to rescue them from their naive and literal interpretation of routine business puffery, such as Borden's "promise" to make all of its distributors millionaires.

A careful examination of the evidence presented to the district court has convinced me that Moffatt cannot prevail on its fraud or misrepresentation claims as a matter of law. Consequently, I would not reach the questions of whether the individual plaintiffs had standing to sue in this case, or whether the district court erred in denying appellants leave to amend their complaint after the court had entered a finding of summary judgment against them. I would affirm the decision of the district court.

807 F.2d 1169

Federal Rules of Civil Procedure for the United States District Courts

→Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.